

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
OCCIDENTAL PERMIAN LTD) FCC File No. 0001072079
Application for Assignment of Licenses for)
Commercial 800 MHz Specialized Mobile)
Radio Frequencies, and Request for Waiver)
of Section 90.621(b) of the Commission's Rules;)
and)
NEXTEL COMMUNICATIONS, INC.)
Request for Waiver of Section 90.617of the)
Commission's Rules)

ORDER

Adopted: February 24, 2005

Released: February 25, 2005

By the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau:

1. In this Order, we address the above-captioned application filed by Occidental Permian, Inc. (Occidental), and requests for waiver filed by Nextel Communications, Inc. (Nextel) and Occidental (Nextel Waiver Request and Occidental Waiver Request, respectively).¹ For the reasons set forth below, we grant the waiver requests.

2. Nextel Waiver Request. Prior to 1995, "intercategory sharing"² enabled Specialized Mobile Radio (SMR), Business, Industrial/Land Transportation (I/LT), and Public Safety eligibles in the 806-821/851-866 MHz bands to apply for frequencies in other service categories regardless of eligibility criteria under certain circumstances.³ In December of 1995, however, the Commission eliminated intercategory sharing for SMR applicants,⁴ and adopted a geographic area licensing approach (Economic

¹ The waiver requests were submitted as attachments to the application. See Nextel Communications, Inc., Request for Waiver of Section 90.617(d) Eligibility Restrictions to Permit Use of SMR Channels for Private Industrial/Land Transportation Operations (Nextel Waiver Request), and Occidental Permian Ltd., Request Waiver of the Separation Rules Contained in Section 90.621(b)(4), FCC File No. 0001072079 (Occidental Waiver Request) (filed Oct. 28, 2002, as amended on Mar. 28, 2003, July 25, 2003, and July 30, 2003).

² See 47 C.F.R. § 90.621(e).

³ See 47 C.F.R. §§ 90.615 (a) and 90.621(e).

⁴ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, PR Docket No. 93-144, 11 FCC Rcd 1463, 1536-37 ¶¶ 138-142 (1995) (800 MHz Report and Order); 47 C.F.R. § 90.621(e)(1).

Areas (EAs)) for such operators.⁵ As part of the new regulatory framework, the Commission authorized EA licensees to relocate incumbents to comparable facilities.⁶ It concluded that a smooth and equitable transition to the new wide-area licensing approach would necessitate some form of mandatory relocation.⁷

Therefore, upon licensing, an EA licensee has the option of relocating incumbents to other channels provided certain requirements are met.⁸ The Commission adopted a mechanism for relocation of incumbents that was finalized in 1997, providing first for voluntary negotiations, then for mandatory negotiations, and lastly for involuntary relocation.⁹

3. In December of 1997, the Commission auctioned EA licenses for the upper 200 channels of the 800 MHz SMR band (800 MHz SMR auction).¹⁰ Nextel's wholly owned subsidiary, Nextel License Acquisition Corporation, was the winning bidder for 475 EAs in the 800 MHz SMR auction.¹¹ The licenses were conditionally granted on June 17, 1998.¹²

4. Nextel is a provider of SMR services, offering digital wide-area services to the public in an integrated package of cellular-like phone service, paging, short messaging, and one-to-one and one-to-many dispatch services.¹³ In order to relocate upper 200 channel incumbent Occidental to comparable channels in the 800 MHz band, Nextel requests to assign Occidental frequencies 856/860.1375 MHz and 856/857.1125 MHz, as well as seven SMR channels, in spectrum blocks L and K.¹⁴ Since intercategory sharing among commercial and noncommercial services is no longer permitted,¹⁵ Nextel seeks waiver of

⁵ 800 MHz Report and Order, 11 FCC Rcd at 1483-85 ¶¶ 23-25.

⁶ *Id.* at 1510 ¶ 79.

⁷ *Id.* at 1507 ¶ 73.

⁸ See 47 C.F.R. § 90.699 which provides, among other things, that EA licensees must guarantee payment of relocation costs, and build and test the system for comparability with the incumbents' existing 800 MHz system.

⁹ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band, *Memorandum Opinion and Order on Reconsideration*, PR Docket No. 93-144, 12 FCC Rcd 9972, 9983-91 ¶¶ 32-58 (1997) (800 MHz MO&O on Recon); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band, *Second Report and Order*, PR Docket No. 93-144, 12 FCC Rcd 19079, 19110-26 ¶¶ 85-132 (1997).

¹⁰ 800 MHz SMR Auction Closes Winning Bidders in the Auction of 525 Specialized Mobile Radio Licenses, *Public Notice*, 12 FCC Rcd 20417 (1997).

¹¹ *Nextel Waiver Request* at 2.

¹² FCC Announces the Conditional Grant of 800 MHz SMR Licenses to Nextel and Nevada Wireless, *Public Notice*, 13 FCC Rcd 12024 (1998).

¹³ *Nextel Waiver Request* at 1.

¹⁴ *Id.* at 2.

¹⁵ See *supra* para. 2.

Section 90.617(d) of the Commission's Rules to permit the assignment of the subject commercial 800 MHz SMR channels to Occidental for private I/LT operations.¹⁶

5. Section 1.925 of the Commission's Rules permits waiver of specific rule requirements if (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁷ Additionally, Section 1.3 of the Commission's Rules provides authority for a rule waiver upon a showing of good cause.¹⁸

6. Section 90.617(c) of the Commission's Rules lists the channels available for I/LT applicants in the 800 MHz band;¹⁹ and Section 90.617(d) of the Commission's Rules lists the channels available for SMR applicants.²⁰ Section 90.617(d) specifically states that the channels listed in that subsection are available only to applicants in the SMR category. The waiver of the Commission's intercategory prohibition sought by Nextel would enable it to use SMR spectrum to relocate an I/LT operator. Based on the record before us, we conclude that a waiver designed to facilitate relocation of 800 MHz SMR upper 200 channel incumbents, especially on a voluntary basis, would serve the public interest.²¹ We believe that such waiver would further the Commission's goals in the 800 MHz SMR proceeding by promoting an efficient and effective transition to geographic area licensing.²² When the Commission adopted Section 90.617(c) and (d) of the Rules, it sought to avoid a potential scarcity of radio frequencies for Private Land Mobile Radio Services (PLMRS) use by stopping the then prevailing practice of incorporating Business and I/LT channels into SMR systems.²³ However, in the instant case, interservice category sharing does not impinge on PLMRS frequencies. Rather, a PLMRS applicant gets the use of channels assigned for SMR operations. Thus, the proposed interservice sharing does not undermine the underlying purpose of the prohibition.²⁴

7. *Occidental Waiver Request.* Section 90.621(b) of the Commission's Rules²⁵ requires license applicants desiring to operate on 800 MHz channels at distances less than seventy miles (113 km)

¹⁶ *Nextel Waiver Request* at 1.

¹⁷ 47 C.F.R. § 1.925(b)(3).

¹⁸ 47 C.F.R. § 1.3.

¹⁹ 47 C.F.R. § 90.617(c).

²⁰ 47 C.F.R. § 90.617(d).

²¹ *See* Nextel Communications, Inc., *Order*, 14 FCC Rcd 11678, 11689 ¶¶ 25, 26 (WTB 1999) (Nextel Order).

²² 800 MHz Report and Order, 11 FCC Rcd at 1537 ¶ 141. *See also* Nextel Order at 11689 ¶ 26.

²³ 800 MHz Report and Order, 11 FCC Rcd at 1537 ¶ 141.

²⁴ *See* American Medical Response, Inc., *Order on Reconsideration*, 15 FCC Rcd 25587, 25590, 25591-92 ¶¶ 8, 11 (WTB PSPWD 2000).

²⁵ 47 C.F.R. § 90.621(b).

from co-channel facilities to submit with their applications either a waiver request²⁶ or a letter of consent from each licensee operating a constructed and operational station with that distance.²⁷ Since Occidental seeks to operate on frequency 856.1125 MHz at a distance less than that prescribed in Section 90.621(b)(4), and such use would affect two co-channel licensees, Occidental submitted a waiver request with respect to one such licensee and a letter of concurrence from the other.

8. First, Occidental requests a waiver of the separation standards to permit it to operate on frequency 856.1125 MHz at its proposed Andrew, Texas, site, which is sixty-five miles from Station WPUR224.²⁸ A certificate of service is attached to Occidental's waiver indicating that CellSMR of Lubbock, licensee of Station WPUR224, was concurrently served with a copy of the waiver request and associated application.²⁹ Also, Occidental submitted an engineering study that demonstrates that both the proposed station and Station WPUR224 will receive the requisite interference protection.³⁰ The technical analysis indicates that the proposed station's 22 dB μ /v interference contour will not overlap with the 40 dB μ /v service contour of the CellSMR station.³¹ In view of Occidental's technical submission, we conclude that it has met the Commission's waiver requirements for short-spacing as it concerns Station WPUR224.

9. Second, Occidental submits a letter indicating consent by Nextel to co-channel separation³² on the specified frequency relative to more than one hundred co-channel Nextel stations.³³ As required by Section 90.621(b)(5) of the Commission's Rules, Nextel, in its consent, certifies that its facilities are constructed and operational and that it accepts any interference resulting from the reduced separation between the proposed facility and its stations.³⁴ Nextel also indicated that it had received a copy of the application as mandated by the Commission's Rules.³⁵ In view of this, we conclude that Occidental also has met the short-spacing criteria concerning Nextel's stations and, thus, the requirements of Section 90.621(b)(5) of the Rules. Short-spacing of stations serves the purpose of spectrum efficiency and allows more licensees to conduct operations than would otherwise be possible, while the consent procedure protects the operations of previously licensed co-channel stations from harmful interference,

²⁶ 47 C.F.R. § 90.621(b)(4).

²⁷ 47 C.F.R. § 90.621(b)(5).

²⁸ *Occidental Waiver Request* at 1.

²⁹ *Id.* at Attachment 1.

³⁰ *Id.* at 2, Attachment 2.

³¹ *Id.*

³² The letter indicating consent was submitted as an attachment to the instant application. *See* Nextel Communications, Inc., Letter of Concurrence, FCC File No. 0001072079 (filed Oct. 28, 2002, as amended on March 28, 2003, July 25, 2003, and July 30, 2003).

³³ *Id.* at 1, Exhibits 1-5.

³⁴ *Id.* at 2.

³⁵ *Id.*

thus permitting flexibility in the granting of additional licenses.³⁶ We achieve both goals with the instant decision.

10. In conclusion, we find that Nextel has met the burden for waiver of the intercategory prohibition in Section 90.617(c) and (d) of the Commission's Rules. Additionally, Occidental has met the short-spacing requirements established in Section 90.621(b)(4) and (5) of the Commission's Rules. This *Order* grants the waiver requests and permits the processing of the subject assignment application.³⁷ This action serves the public interest because it promotes the effective transition to geographic licensing sought by the Commission.

11. Accordingly, **IT IS ORDERED**, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.925(b)(3), 90.617(c) and (d), and 90.621(e)(4) and (5) of the Commission's Rules, 47 C.F.R. §§ 1.925(b)(3), 90.617(c), (d), 90.621(e)(4), (5), that the requests for waiver filed by Nextel Communications, Inc., and Occidental Permian Ltd., **ARE GRANTED**, as set forth above.

12. **IT IS FURTHER ORDERED** that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that application FCC File No. 0001072079 **SHALL BE PROCESSED** consistent with this *Order*.

13. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
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Wireless Telecommunications Bureau

³⁶ Cf. Britz Fertilizers, Inc., *et al.*, *Order on Reconsideration*, 19 FCC Rcd 6819, 6821 ¶ 3 (PSCID 2004).

³⁷ The waiver grants are conditioned on the completion of the processing of the subject assignment application.